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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RICHARD L. MILLER, Plaintiff and Appellant, v. BERNARD WOLF, Defendant and Respondent.	A123912 (San Francisco County Super. Ct. No. 461688)

Appellant Richard L. Miller appeals following the sustaining of a demurrer without leave to amend in his attorney malpractice action against respondent Bernard Wolf. He argues that his fourth amended complaint stated valid causes of action and that his complaint was timely. Because we conclude that both of the causes of action appellant alleged are barred by the statute of limitations (Code Civ. Proc., § 340.6),[1] we affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In setting forth the relevant facts for purposes of our review of an appeal from a judgment of dismissal following the sustaining of a general demurrer, we treat the demurrer as admitting all properly pleaded material facts and also consider matters which may be judicially noticed. (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1126.)

[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

Appellant's ex-wife brought a petition pursuant to Family Code, section 2120 et seq. against appellant, seeking to set aside a stipulated judgment for the dissolution of their marriage. Appellant was represented by attorney James Madow (who is not a party to this appeal), and the matter proceeded to trial. At some point after trial in the matter began on October 1, 2001, appellant hired respondent to assist Madow regarding family law issues. The trial court ruled in appellant's favor on almost every issue, and respondent submitted a proposed statement of decision that was signed by the trial court with little change. Judgment was entered in accordance with the statement of decision, and appellant's ex-wife appealed.

Respondent represented appellant in connection with the appeal. He prepared the respondent's brief and appeared at oral argument. In an unpublished opinion filed on June 15, 2004, Division Three of this court reversed in part and remanded for further proceedings, concluding that the relevant statements of decision[2] were inadequate to explain many of the trial court's "conclusory findings that seem to be at odds with substantial evidence to the contrary." (*In re Marriage of Miller & Browne-Miller* (A100703, A101340, A102617).) On remand, the trial court again ruled in appellant's favor and adopted a proposed statement of decision drafted with help from respondent. Appellant's ex-wife again appealed.

On March 28, 2006 (during the pendency of the second appeal), respondent filed a substitution of attorney form withdrawing as appellant's attorney of record. The form was signed by appellant on March 20, 2006. In an unpublished opinion, Division Three of this court later affirmed in part and reversed in part the trial court's order that was based on the revised statement of decision. (*In re Marriage of Miller & Browne-Miller* (Jan. 5, 2007, A111584).)

Appellant filed a complaint in the instant action on March 26, 2007, alleging a single cause of action for legal malpractice. Following two amendments, his second

[2] Appellant's complaint refers to a single statement of decision prepared by respondent, whereas the relevant Court of Appeal opinion considered multiple statements of decision prepared in connection with three separate orders.

amended complaint alleged that respondent breached his duty of care to appellant by preparing an inadequate statement of decision and by mishandling the subsequent appeal. Appellant also included a second cause of action, for "Disgorgement of Legal Fees Paid," alleging that respondent was required to repay attorney fees he received because he failed to provide legal services "in a manner commensurate with his expertise as a renowned family law appellate specialist." Respondent demurred to the complaint. The trial court sustained the demurrer with leave to amend, concluding that the statute of limitations began to run no later than March 20, 2006, when respondent's representation was terminated, and that the filing of the complaint more than one year later therefore was untimely (§ 340.6).

Appellant filed a third amended complaint, which added an allegation that respondent was out of California "on pleasure trips" for at least 10 days between March 20, 2006 and March 28, 2007. (§ 351 [statute of limitations tolled when defendant out of state].) As for the complaint's second cause of action, appellant for the first time alleged that respondent was required to disgorge fees paid to him because his actions violated Business and Professions Code section 17200 (section 17200). Respondent again demurred.

The trial court again sustained respondent's demurrer with leave to amend. The court concluded that the statute of limitations was not tolled by respondent's alleged absence from the state, because the tolling provision set forth in section 351 did not apply to actions governed by section 340.6.

Appellant's fourth amended complaint was virtually identical to the third amended complaint, and respondent again demurred. The trial court sustained the demurrer without leave to amend, concluding that the complaint was time-barred for the reasons set forth in the court's previous orders. As for appellant's second cause of action (for disgorgement), the court concluded that it was nothing more than a restatement of appellant's legal malpractice claim with a reference to section 17200, and that appellant had failed to allege facts that supported such a claim. Appellant timely appealed from the subsequent judgment.

II.
DISCUSSION

A. Attorney Malpractice Cause of Action Barred by Statute of Limitations.

Appellant argues that the trial court erred in concluding that his legal malpractice cause of action was barred by the statute of limitations. Section 340.6, subdivision (a), provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury; [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year-limitation; and [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." "Thus, the limitations period is one year from actual or imputed discovery, or four years (whichever is sooner), unless tolling applies." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 508.)

The parties agree that the one-year statute of limitations period set forth in section 340.6 applies to appellant's malpractice cause of action. Appellant does not challenge on appeal the trial court's conclusion that the statute of limitations began to run no later than March 20, 2006, the date he signed a substitution of attorney form replacing respondent as counsel of record.[3] Appellant's filing of his complaint more than one year

[3] Appellant argued below that the statute of limitations did not begin to run until March 28, 2006, the date that the substitution of attorney form was filed with the Court of Appeal. However, he accepts the March 20 date for purposes of this appeal.

later (on March 26, 2007), was therefore untimely absent some other reason for the statute being tolled.

Appellant's fourth amended complaint alleged, on information and belief, that respondent was out of the state on pleasure trips for at least 10 days between March 20, 2006, and March 28, 2007. Appellant argues, as he did below, that the one-year statute of limitations was tolled by section 351, which provides that a defendant's absence from the state is not included as part of the time for commencement of a cause of action. The trial court, citing *Laird v. Blacker* (1992) 2 Cal.4th 606, 618, rejected this argument and concluded that section 351 did not apply, because the tolling provisions set forth in section 340.6 are exclusive. We agree.

Plaintiff client in *Laird v. Blacker* sued her former attorney more than one year (but less than four years) after she had discharged the attorney following dismissal of an action for lack of prosecution. (2 Cal.4th at pp. 609-610.) The Supreme Court held that the statute of limitations for legal malpractice actions begins to run when an entry of adverse judgment or final order of dismissal is entered, because that is when a client suffers "actual injury" for purposes of section 340.6. (*Laird v. Blacker*, *supra*, at p. 615.) In rejecting plaintiff's argument that the statute of limitations was tolled until she dismissed an appeal of the adverse judgment (*id.* at pp. 610, 615), the court quoted the language of section 340.6 that " 'in no event' " shall the statute of limitations period be tolled except under specified circumstances, concluding that "the Legislature *expressly intended to disallow tolling under any circumstances not enumerated in the statute*." (*Laird v. Blacker* at p. 618, italics added; see also *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756 ["The Legislature expressly disallowed tolling under any circumstances not stated in [section 340.6]"].) Relying on *Laird*, the court in *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 976, 979-980, held that equitable tolling did not extend the one-year limitations period in section 340.6, because the tolling provisions in the statute were exclusive. It follows that section 351, regarding absences from the state, is inapplicable here.

In arguing that the tolling provisions set forth in section 340.6 are not exclusive with respect to the one-year limitations period, appellant relies on *Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928 (*Belton*). Plaintiff in *Belton* was a federal prison inmate who filed a medical malpractice action against defendant ambulance service for injuries he suffered while being transferred from prison to a hospital. (*Id.* at pp. 929-930.) The statute of limitations applicable to medical malpractice actions provides that an action must be brought within three years after the date of injury or one year after the plaintiff discovers or should have discovered the injury, whichever occurs first. (§ 340.5.) The statute further provides: "In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following [specified reasons]." (§ 340.5.) Plaintiff filed his lawsuit more than one year (but less than three years) after he discovered his injury, and he argued that the statute of limitations was tolled because of his imprisonment (§ 352.1, subd. (a)). (*Belton*, *supra*, at p. 930.) The Supreme Court agreed, concluding that according to the plain language of section 340.5, the limits on tolling rules applied only to tolling the limitations beyond three years, as opposed one year. (*Id.* at pp. 931-932.)[4]

Appellant stresses the similarities between the language of sections 340.5 and 340.6 and argues that the tolling provisions in section 340.6 also are exclusive only with respect to the outer (four-year) limitations period. Although there is no question that the statutes are similarly worded, they are not identical. The statute applicable in medical malpractice actions (§ 340.5) states: "In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following," without reference to the shorter, one-year limitation period. By contrast, section 340.6, subdivision (a) states: "In no event shall the time for commencement of legal action exceed four years except that *the period* shall be tolled during the time that any of the following exist . . . ."

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4 Relying on *Belton*, *supra*, 20 Cal.4th 928, the court in *Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637 held that the tolling provision appellant seeks to apply here (§ 351) was applicable in a medical malpractice action where the one-year limitations period (§ 340.5) was at issue. (*Kaplan* at p. 643.)

(Italics added.) This wording difference was analyzed in *Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, which considered whether the tolling provisions of section 340.6, subdivision (a) apply to both the one-year and four-year limitations periods. The court noted that the Assembly bill that was later codified as section 340.6 originally mirrored the medical malpractice statute, insofar as it provided that " '[i]n no event shall the time for commencement of legal action exceed three years unless tolled for any of the following . . . .' " (*Gurkewitz* at p. 335.) The bill later was amended to read, " 'except that *the period* shall be tolled during the time that any of the following exist,' " a reference to both limitations periods. (*Id.* at p. 336, italics added.) The court "reach[ed] the inescapable conclusion that the Legislature changed these words affecting the tolling provisions in order to clearly toll both the one- and four-year provisions of the statute . . . ."[5] (*Ibid.*)

We agree with the court's analysis in *Gurkewitz v. Haberman*. Because "the period" to be tolled in section 340.6, subdivision (a) refers to both limitations periods (one year and four years) in the statute (*Gurkewitz v. Haberman*, *supra*, 137 Cal.App.3d at p. 336), the relevant tolling provisions are exclusive for both periods. As there is no tolling provision in section 340.6, subdivision (a) for absences from the state, and since section 351 does not apply here, appellant's attorney malpractice cause of action is time-barred.[6]

B. Statute of Limitations Bars Appellant's Disgorgement Cause of Action.

Appellant also challenges the trial court's conclusion that his second cause of action was "nothing more than a restatement of [his] legal malpractice claim with a

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5 The court also noted that one of the four tolling provisions (for willful concealment by the attorney, § 340.6, subd. (a)(3)) is specifically limited to the four-year limitations period. (*Gurkewitz v. Haberman*, *supra*, 137 Cal.App.3d at p. 335.) "If the words 'the period' refer only to the four-year limitation, why do the words 'except that this subdivision shall toll only the four-year limitation' modify solely subdivision (a)(3) of section 340.6?" (*Ibid.*)

6 In light of our conclusion, we need not consider respondent's arguments that the continuous representation rule (§ 340.6, subd. (a)(2)) does not apply, and that appellant is estopped from claiming that his complaint was timely.

reference to" section 17200 and that appellant failed to allege facts to support such a claim. Because appellant's second cause of action also was barred by the statute of limitations, we affirm the trial court.

Appellant's fourth amended complaint alleged that appellant agreed to pay respondent's fee of $400 per hour because of his representations that he was an expert in the areas of family law and appellate practice, that respondent promised to perform legal services in a manner commensurate with his expertise, and that respondent failed to perform legal services in the manner expected of him in violation of Business and Professions Code sections 17200 (prohibiting unfair competition) and 17500 (prohibiting false advertising). Appellant argues that respondent "is clearly liable under Business and Professions Code [section] 17200 fraud and unfair prongs [*sic*]," and that his second cause of action is subject to a four-year statute of limitations (Bus. & Prof. Code, § 17208). (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179 [actions that would be time-barred if brought under Labor Code subject to longer statute of limitations where alleged wrongdoing also violates § 17200].)

In fact, appellant's complaint simply alleged a malpractice claim against respondent. Although appellant alleged that respondent advertised himself as "an expert on family law issues and as a certified family law specialist," appellant did not claim that this representation was false (cf. Bus. & Prof. Code, § 17500). Instead, he alleged that respondent failed to adequately perform legal services as expected, and that appellant suffered damages as a result. In short, appellant alleged a cause of action for professional negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [elements of legal malpractice cause of action are duty, breach, causation, and damages].)

The statute of limitations set forth in section 340.6 applies to all legal malpractice actions except actual fraud, whether the cause of action sounds in tort or contract.[7] (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368-1369; *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 431, disapproved on another ground in *Laird v. Blacker*, *supra*, 2 Cal.4th at p. 617.) Appellant may not avoid the statute of limitations for his malpractice action simply by alleging that respondent's alleged wrongdoing amounted to an unfair business practice.[8] We need not decide whether an attorney's wrongdoing may ever give rise to a claim pursuant to section 17200, subject to a different statute of limitations. Under the facts alleged here, however, we agree with the trial court that appellant's second cause of action was simply a repackaging of his attorney malpractice cause of action, which is subject to a one-year statute of limitations.

C. Sanctions.

Respondent has filed a motion for sanctions pursuant to section 907 and California Rules of Court, rule 8.276, claiming that appellant's appeal is frivolous in that it indisputably lacks merit and was brought with the intention to harass. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.) We deny the motion. Respondent focuses on statements made in a separate lawsuit filed by appellant after the trial court in this matter granted respondent's demurrer to appellant's third amended complaint with leave to

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7 Appellant alleged a "breach of the fee agreement" between him and respondent. Citing this court's opinion in *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, appellant claims that the legal fees he paid to respondent are not recoverable in a malpractice action, suggesting that he may seek recovery of his fees only through a cause of action pursuant to section 17200. This court held in *Orrick* that where there is no evidence of a tort claim against an attorney and a case is simply a fee dispute, a plaintiff may pursue only contract causes of action. (*Orrick* at p. 1054.) Where, as here, a client claims that he did not get what he paid for, he may pursue contract claims against his attorney (*id.* at p. 1061), assuming that they are not time-barred.

8 That the trial court sustained respondent's demurrer on a different ground does not alter our conclusion. "It is judicial action and not judicial reasoning which is the subject of review. . . ." (*El Centro Grain Co. v. Bank of Italy, etc.* (1932) 123 Cal.App. 564, 567.)

amend.[9] Appellant filed a malpractice action against the attorney who originally filed this malpractice action, accurately alleging in his complaint that the trial court in this action had ruled that this action was untimely. (*Miller v. Madow* (Super. Ct. Marin County, 2008, No. CV082668).) We disagree with respondent's assertion that the separate lawsuit "constitutes an admission that this appeal is without merit." We likewise disagree that there is evidence showing indisputably that allegations in appellant's fourth amended complaint "are knowingly or recklessly false" so as to warrant sanctions on appeal.

Although there is binding authority holding that the tolling provisions of section 340.6 are exclusive (*Laird v. Blacker*, *supra*, 2 Cal.4th at p. 618), appellant candidly acknowledges this authority in his opening brief, arguing that the Supreme Court's subsequent opinion in *Belton*, *supra*, 20 Cal.4th 928 controls here. Respondent dismisses *Belton* as inapplicable because it analyzed the statute of limitations applicable to medical malpractice actions. However, at least one published opinion (decided before *Belton*) analyzed the similarities between sections 340.5 and 340.6 when holding that the tolling provisions of section 340.6 are exclusive, which supports appellant's argument that *Belton*'s analysis of section 340.5 is relevant here. (*Gordon v. Law Offices of Aguirre & Meyer*, *supra*, 70 Cal.App.4th at p. 980, citing *Hollingsworth v. Kofoed* (1996) 45 Cal.App.4th 423, 427 [tolling provisions in § 340.5 exclusive], disapproved in *Belton*, *supra*, 20 Cal.4th at p. 935.) We cannot say that no reasonable attorney would consider filing an appeal, or argue that *Belton* applies here. (*Tullai v. Homan* (1987) 195 Cal.App.3d 1184, 1188 [no sanctions where party acknowledged contrary authority and argued for change in law]; see also *Gurkewitz v. Haberman*, *supra*, 137 Cal.App.3d at p. 335 [intent of § 340.6, subd. (a) "is by no means clear"].)

[9] This court granted respondent's unopposed motion to take judicial notice of the complaint and various other documents.

III.
DISPOSITION

The judgment is affirmed. Respondent's motion for sanctions is denied. Respondent shall recover his costs on appeal.

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Sepulveda, J.

We concur:

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Ruvolo, P. J.

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Rivera, J.